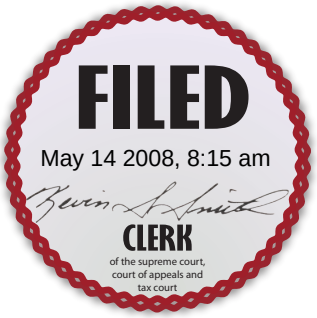

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IN THE
COURT OF APPEALS OF INDIANA

RONALD G. FOX II,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 35A02-0711-CR-942
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE HUNTINGTON CIRCUIT COURT
The Honorable Thomas M. Hakes, Judge
Cause No. 35C01-0702-FD-15

May 14, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

DARDEN, Judge

STATEMENT OF THE CASE

Ronald G. Fox II appeals his conviction and sentence for battery on a child, as a class D felony.[1]

We affirm.

ISSUES

1. Whether there is sufficient evidence to support the conviction.

2. Whether the sentence is inappropriate pursuant to Indiana Appellate Rule 7(B).

FACTS

Fox lived with his wife, Jennifer, their daughter, and Jennifer's two sons from previous relationships, B.C. and A.O. On or about February 9, 2007, Fox and Jennifer went to Miller's Pub in Andrews. They left the three children, including then-nine-year-old B.C., at home in the care of a friend. During the evening, both Fox and Jennifer consumed several alcoholic drinks.

Upon their return home, Jennifer became upset because B.C. was awake. An argument ensued and B.C. called Fox "a drunk . . . ." (Tr. 174). Fox then called B.C. "a little bastard . . . ." (Tr. 145). After Jennifer told Fox that "[he] wouldn't say that to [B.C.] if he w[ere] [his] own child," Fox hit Jennifer in the nose. (Tr. 146). B.C. attempted to intervene by jumping on Fox's back. Fox then pushed B.C., causing B.C. to fall against the bathtub and "hurt [his] head." (Tr. 175).

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[1] Ind. Code § 35-42-2-1.

Subsequently, Fox either took or sent B.C. to B.C.'s bedroom, where Fox "kicked [B.C.] after [B.C.] kicked him first" because Fox had "grabbed" B.C. (Tr. 175). The kick to B.C.'s leg felt "horrible" and caused a scrape or scratch extending from below B.C.'s knee to his thigh. (Tr. 175).

On Monday, February 12, 2007, B.C. informed Vicki Graft, his elementary school counselor, that Fox had hurt him. B.C. showed Graft a "scrape mark on his leg and . . . scratch like mark on his shoulder . . . ." (Tr. 132). Graft reported the allegations to the Huntington County Office of Family and Children (the "OFC"). That same day, Detective Steve Coe of the Huntington County Sheriff's Department and Judy Couch, a caseworker with the OFC, interviewed B.C. at his school. B.C. showed Detective Coe his injuries, including the injury to B.C.'s leg and "a faint bruise" on B.C.'s arm. (Tr. 209).

On February 13, 2007, the State charged Fox with Count 1, battery on a child, as a class D felony; and Count 2, invasion of privacy. On March 7, 2007, the State filed a motion to dismiss Count 2, which the trial court granted. Following a trial on May 24, 2007, a jury found Fox guilty of class D felony battery.

The trial court ordered a presentence investigation report (the "PSI"), which indicated that Fox had the following convictions: 1) failure to prove financial responsibility; 2) failure to stop following a collision with an unattended vehicle; 3) public intoxication; 4) check deception; 5) conversion; 6) false informing; 7) two convictions for driving while suspended; 8) two convictions for resisting law enforcement; 9) criminal confinement; 10) two convictions for invasion of privacy; and

11) three convictions for battery. The third battery conviction was in 2005. The PSI also showed that Fox had had his probation revoked three times.

The trial court held a sentencing hearing on June 18, 2007. The trial court found two mitigating circumstances: Fox's show of remorse and that Fox was in counseling. The trial court also found two aggravating circumstances: Fox's criminal history and that Fox was in a position of trust. Finding that the aggravators outweighed the mitigators, the trial court sentenced Fox to three years.

DECISION

1. Sufficiency of the Evidence

Fox asserts that the evidence was insufficient to support his conviction for battery. Specifically, Fox contends that the State failed to show that B.C. sustained a bodily injury after Fox pushed him and that Fox's parental discipline of B.C. was not justified when Fox kicked B.C.

> When reviewing the sufficiency of the evidence to support a conviction, appellate courts must consider only the probative evidence and reasonable inferences supporting the verdict. It is the fact-finder's role, not that of appellate courts, to assess witness credibility and weigh the evidence to determine whether it is sufficient to support a conviction. To preserve this structure, when appellate courts are confronted with conflicting evidence, they must consider it most favorably to the trial court's ruling. Appellate courts affirm the conviction unless no reasonable fact-finder could find the elements of the crime proven beyond a reasonable doubt. It is therefore not necessary that the evidence overcome every reasonable hypothesis of innocence. The evidence is sufficient if an inference may reasonably be drawn from it to support the verdict.

Drane v. State, 867 N.E.2d 144, 146-47 (Ind. 2007) (quotations and citations omitted).

Pursuant to Indiana Code section 35-42-2-1(a)(2)(B), it is a class D felony for a person who is at least eighteen years of age to knowingly or intentionally touch another person, who is less than fourteen years of age, in a rude, insolent, or angry manner, resulting in bodily injury. Bodily injury is defined as, "any impairment of physical condition, including physical pain." I.C. § 35-41-1-4. Indiana Code section 35-41-3-1, however, provides that "[a] person is justified in engaging in conduct otherwise prohibited if he has legal authority to do so." We interpret this statute as permitting a parent to engage in reasonable discipline of his child, even if such conduct would otherwise constitute battery. *Mitchell v. State*, 813 N.E.2d 422, 427 (Ind. Ct. App. 2004), *trans. denied*. In order to be justified, the discipline must not be cruel, unreasonable or excessive. *Id*.

First, Jennifer testified that Fox "shoved" or threw B.C. into the bathtub, where B.C. hit his head. (Tr. 146). B.C. testified that Fox "pushed" him into the bathtub, causing B.C. to "hurt [his] head." (Tr. 175). Given this testimony, the evidence was sufficient to show that Fox caused bodily injury to B.C.

Second, Fox testified that he sent B.C. to his room, where B.C. started kicking his toys. When Fox went into the room to make B.C. stop, B.C. kicked Fox "in the knee, so [Fox] just kicked him back in the knee just to let him know how it felt . . . ." (Tr. 244). Fox's kick to B.C.'s leg caused a large red mark, which felt "horrible." (Tr. 175). A reasonable trier of fact could have concluded that Fox's conduct in kicking B.C. was excessive and did not constitute reasonable parental discipline. Fox's arguments to the

contrary amount to an invitation to reweigh the evidence and credibility of the witnesses, which we will not do.

2. Inappropriate Sentence

Fox asserts that his sentence of three years is inappropriate because his "prior legal history doesn't consist of any crimes against children." Fox's Br. 14. We may revise a sentence if it is inappropriate in light of the nature of the offense and the character of the offender. Ind. Appellate Rule 7(B). It is the defendant's burden to "'persuade the appellate court that his or her sentence has met th[e] inappropriateness standard of review.'" *Anglemyer*, 868 N.E.2d at 494 (Ind. 2007) (quoting *Childress v. State*, 848 N.E.2d 1073, 1080 (Ind. 2006)).

In determining whether a sentence is inappropriate, the advisory sentence "is the starting point the Legislature has selected as an appropriate sentence for the crime committed." *Childress*, 848 N.E.2d at 1081. The advisory sentence for a class D felony is one and one-half years with a potential maximum sentence of thirty-six months. I.C. § 35-50-2-7.[2] Here, the trial court sentenced Fox to the maximum sentence.

Regarding the nature of the offense, the record discloses that Fox shoved B.C. after B.C. tried to prevent Fox from hitting B.C.'s mother. The shove caused B.C. to fall into a bathtub and hit his head. Furthermore, Fox kicked B.C., "just to let him know how

[2] Indiana's new advisory sentencing scheme, which went into effect on April 25, 2005, applies in this case. Pursuant to Indiana Code section 35-50-2-7, "[a] person who commits a Class D felony shall be imprisoned for a fixed term of between six (6) months and three (3) years, with the advisory sentence being one and one-half (1 1/2) years."

it felt . . .” after B.C. kicked Fox in response to Fox grabbing him. (Tr. 244). The kick left B.C. with a large scratch on his leg.

Regarding Fox’s character, the record reflects that Fox has several prior convictions, including three convictions for battery. Although the previous convictions may not have been for crimes against a child, they show a history of violent behavior, which has escalated to committing battery against a child. Moreover, Fox has previously had his probation revoked. Accordingly, prior attempts to rehabilitate Fox and deter him from future unlawful conduct have failed. Based on the above, we conclude that the sentence imposed by the trial court was not inappropriate.

Affirmed.

NAJAM, J., and SHARPNACK, Sr. J., concur.